Supreme Court, U.S.
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No. 97-107

In The

Supreme Court of the United States

October Term, 1996

GRANT T. LINDSAY, F. BRUCE STEVENS, RUSSELL M. RASMUSSEN, AND THOMAS C. LABAU,

Petitioners,

v.

THIOKOL CORPORATION AND THIOKOL CORPORATION PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

May a pension plan have a formula which uses age 67 as the arbitrary benchmark from which the level of benefits are calculated, where the plan complies with all substantive requirements of ERISA, allowing each employee to retire at age 65 with the full, nonforfeitable benefit he has accrued, and where ERISA mandates no particular benefit level or formula?

ENTITIES RELATED TO RESPONDENT THIOKOL CORPORATION

Pursuant to Sup. Ct. R. 29.6., Thiokol Corporation submits the following list of affiliated entities:

Huck International, Inc.

Huck S.A.

Huck International GmbH & Co.

Huck International Ltd.

Thiokol Holding Co.

Howmet Corporation

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STATEMENT OF THE CASE

Thiokol Corporation's 1991 pension plan amendment discontinued, prospectively only, a subsidy[1] for retirement before age 65. The amendment protected all accrued benefits, including accrued early retirement subsidies. No Petitioner is claiming his accrued benefits were affected.

The subsidy was eliminated in part because of the Tax Reform Act of 1986 ("TRA 86").[2] TRA 86 forced Thiokol to choose between eliminating the subsidy or making major adjustments to benefit levels to narrow the monetary gap, or "permitted disparity," between the pension benefits of highly paid, long-service employees – like the Petitioners – and the benefits of other employees.

In addition, aerospace industry experts were predicting a future shortage of highly skilled workers. Thus,

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[1] An "early" retirement benefit normally consists of the "actuarial equivalent" of the benefit which the employee has earned and would receive if he began receiving benefits at a plan's "normal retirement age." When the employee does not wish to wait until the plan's normal retirement age to receive benefits, the payment is actuarially reduced to account for the fact that it is being paid earlier, and will therefore be paid over a longer period of time.

Similarly, if an employee postpones retirement until after a plan's "normal retirement age," the benefit may be actuarially enhanced because it will be paid over a shorter period of time. In either case, the benefit received is the full benefit earned.

An early retirement "subsidy" provides the early retiree a benefit which has not been fully actuarially reduced. No employer is required even to allow retirement before age 65, let alone "subsidize" it.

[2] Tax Reform Act of 1986, Pub. L. No. 99-509, 100-203, 100-418, 100-647, 101-73, 101-221, 101-508, 104-188 (1986).

Thiokol no longer wished to encourage early retirement by subsidizing it. To encourage workers to stay even beyond 65, Thiokol offered significantly enhanced benefits at ages 66 and 67. It is undisputed that this later retirement "bonus" was never offered to nor expected by participants retiring at age 65.[3]

Overall, the 1991 amendment enriched and benefited the plan. Thiokol's contribution to the plan increased by approximately $900,000 per year to fund increased benefits. The age 65 benefits of most participants remained the same or increased. Approximately 550 participants received substantial benefit increases because the amendment "bridged" a prior break in service.

The Petitioners retired early. Thus, the elimination of the early retirement subsidy impacted their benefits. In addition, these Petitioners are among a relatively small group of highly paid, long service employees whose benefit accrual rates were lowered slightly by the 1991 amendment to comply with the "permitted disparity" rules of TRA 86.

No benefit – not the benefits of these Petitioners nor anyone else – was rendered lower simply because it was calculated from age 67, rather than age 65. The designation of a point from which to calculate the benefit is a discretionary decision – simply one element in a

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[3] This fact is significant, as explained later in the text, because it means that even if Petitioners somehow prevailed on their claims here, they would receive no higher benefits. For this and other reasons, Petitioners' claims are insubstantial and Petitioners lack standing even to bring them.

formula – which does not, by itself, determine the level of benefits.

Thiokol determined the level of benefits it wished to offer, then selected a formula calculating benefits from age 67, because it required only reductions for retirement before that age. Thiokol could have expressed the identical benefits with a formula calculating from age 65, with reductions before 65, and additions after 65. In fact, the identical benefit could be calculated from any number of ages, simply by adjusting other elements of the formula. Respondents' Appendix A contains two charts from the Record illustrating how this works.

The formula using age 67 was simplest, so Thiokol chose it. If Thiokol had chosen the age 65 formula, Petitioners would be receiving exactly the same benefit. The same number of dollars would be called a "full" benefit under the age 65 formula, and a "reduced" benefit under the age 67 formula. Thus, the "reductions" of which Petitioners complain are illusory, because they are made from a hypothetical projected benefit. It is undisputed that Petitioners, even under the age 67 formula, receive the entire benefit they had earned, or accrued, at their retirement.

Petitioners Rasmussen and Stevens filed objections to Thiokol's plan with the I.R.S., asserting the plan violated ERISA by using age 67 as its benchmark. The I.R.S. at first requested that the plan be amended to change the benchmark. However, when Thiokol pointed out that the plan complied with all statutory requirements at age 65, the I.R.S. approved the plan, issuing a favorable determination on May 17, 1994. The I.R.S. approved a restated

plan – still calculating benefits from age 67 – on January 19, 1995.

Petitioners brought suit in the United States District Court for the District of Utah, alleging four counts based on Thiokol's calculation of benefits from age 67, and two counts alleging procedural violations. All counts were dismissed on summary judgment. On appeal, the Petitioners abandoned their procedural claims. The Tenth Circuit affirmed the District Court's decision on the remaining claims.

ARGUMENT

No "compelling reason" for granting the writ is present in this case. *See* Sup. Ct. R. 10. The petition for certiorari is a deceptive attempt to create the illusion that something significant is at stake. In fact, Petitioners' entire argument is a play on words with no substance at all.

There is no conflict among circuits. Sup. Ct. R. 10(a). This question has never been addressed by any circuit other than the Tenth Circuit.

Despite Petitioners' alarmist prose, the decision in this case will not make one dime's difference to other workers and pensioners in this country. Furthermore – though they seem to believe otherwise – a victory in this case would not result in higher benefits for Petitioners, either. Thus, the question presented by Petitioners is not an "important federal question." Sup. Ct. R. 10(b).

I. PETITIONERS' ARGUMENT IS MERELY A PLAY ON WORDS, DELIBERATELY GARBLING TWO DISTINCT USES OF THE TERM "NORMAL RETIREMENT AGE."

Petitioners cobbled together their argument by confusing two distinct uses of the term "normal retirement age." After having their mistake in logic explained to them at the I.R.S., the Utah District Court, and the Tenth Circuit, Petitioners' confusion must, by this time, be deliberate.

A. ERISA Defines "Normal Retirement Age" Only for Its Internal Purposes.

ERISA defines "normal retirement age" at 29 U.S.C. § 1002:

> **For purposes of this title** . . . (24) The term "normal retirement age" means **the earlier of** – (A) the time a plan participant attains **normal retirement age under the plan, or** (B) the later of – (i) the time a plan participant attains **age 65**, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan. (Emphasis added)

Tellingly, Petitioners usually omit the critical, limiting introductory phrase emphasized above, stating that the definition is "for purposes of" ERISA. Moreover, on its face, § 1002(24) recognizes that "normal retirement age under the plan" is distinct from the statutory definition. This subsection also allows for the possibility that "normal retirement age under the plan" may sometimes be earlier, and sometimes be later, than age 65 (subsection

(B)(i)), or even later than some age greater than 65 (subsection (B)(ii)).

ERISA employs this definition in its substantive provisions to require vesting of a participant's entire accrued benefit no later than age 65 and payment of benefits by that age if a participant so desires. It is undisputed that Thiokol's plan vests no later than age 65 and that it provides for payment at 65 of the entire benefit a participant has earned by that age.

Beyond ERISA's express substantive requirements, the statute's definitional provisions do not give rise to any substantive right to have benefits calculated in any specific way. *DeNobel v. Vitro Corp.*, 885 F.2d 1180, 1192 (4th Cir. 1989).

B. The Term "Normal Retirement Age" Is Used Outside ERISA to Mean the Benchmark Age from Which Benefits Are Calculated; a Usage Which Is Not Mentioned in, nor Regulated by, ERISA.

The term "normal retirement age" has another meaning to pension plan designers – a meaning which predates, and is distinct from, ERISA's statutory uses. "Normal retirement age" is also the name for the discretionary "benchmark" age discussed in the Statement of the Case. It is the age at which a hypothetical benefit is calculated, making additions to, or subtractions from, the hypothetical benefit to arrive at the benefit payable at the time retirement actually takes place.

Nothing in ERISA requires that plan formulae calculate benefits from any particular age. Nothing in ERISA

expressly caps the age from which benefits must be calculated. Petitioners argue that this Court should read such a requirement into the statute. As the Tenth Circuit recognized, however, "There is no support for the argument that the statute should be judicially rewritten to make this modification." (Petrs. App. 3a.)

There is no support for a number of reasons. First, as explained above, the designation of a benchmark does not, by itself, determine benefit levels.

Second, any employer can avoid this entire argument simply by calling its benchmark something other than "normal retirement age." If Thiolol had calculated its benefit from age 67, but called age 67 "the benchmark," or "regular retirement age," or "target retirement age," or even "George," the Petitioners would have no argument at all. As the Tenth Circuit stated

> Plaintiffs do not dispute that the substance of Thiokol's plan could satisfy ERISA with only a change in terminology. Where the dictates of a statute regulating verbally defined benefits can be satisfied by various terms, there is no rational basis for a court to read into the statute a requirement of the use of speific words absent an express provision in the statute governing terminology.

(Petrs. App. 8a.)

Finally, as explained more fully below, even if the designation of a benchmark overage 65 did, by itself, reduce future benefit accruals – as Petitioners deceptively assert – ERISA permits such reductions.

II. THE TENTH CIRCUIT'S DECISION CHANGES NO LAW AND WILL IMPACT NO OTHER WORKERS OR PENSIONERS, BECAUSE EMPLOYERS HAVE ALWAYS BEEN FREE TO LOWER, OR EVEN ELIMINATE, FUTURE BENEFIT ACCRUALS.

The Tenth Circuit's decision changes nothing in ERISA. There has never been an express or implied limit on the benchmark age for calculating benefits, and other plans have adopted benchmarks over 65. Furthermore, if a limit on the benchmark were now imposed, it would make no substantive difference because there are a number of other ways to reduce benefit levels, and employers have always been free to raise or reduce future benefit accruals, or to eliminate them entirely, subject only to certain restrictions, such as prior notice, not relevant here.

ERISA does not require employers to provide a pension. *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4677 ("[A]n employer has no affirmative duty to provide employees with a pension plan."). If an employer chooses to offer a pension, it can establish the benefit levels it desires and can afford. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981). ERISA guarantees no particular method or formula for calculating those benefits. *Id.* at 512.

Moreover, once a plan is established, an employer is free to amend it to provide lower future benefits, as long as the employer preserves benefits already earned by each employee. "ERISA only requires that *accrued* benefits not be reduced by amendment of the plan. It does not instruct the employer to adopt a plan and then maintain

it in perpetuity pursuant to its original terms." *Gluck v. Unisys Corp.*, 1991 WL 14083, at *13 (E.D. Pa. 1991), *aff'd in part, rev'd in part on other grounds*, 960 F.2d 1168 (3d Cir. 1992) (emphasis added).

In sum, Congress was not concerned with establishing, or even maintaining, any particular level of benefits, nor was it concerned with dictating the formulae by which benefits are calculated. Rather, ERISA seeks to ensure that a benefit defined and promised *by the employer* is not reduced *after* an employee has earned it. Thiokol carefully protected all accrued benefits when amending its plan, and there is no claim to the contrary here.

Petitioners disingenuously claim that the Tenth Circuit's decision will result in employers everywhere lowering future retirement benefits by raising the benchmark from which benefits are calculated. (Pet. 8.) As explained above, Petitioners' benefits were *not* reduced by the designation of age 67 as the benchmark. Petitioners' benefits are somewhat lower after the plan amendment primarily because early retirement is no longer encouraged by a subsidy, and, to a much smaller degree, because Petitioners' previous age 65 benefits were too high to conform to TRA 86.

But, even if Thiokol had chosen to lower the plan's future benefits simply by moving the benchmark age forward, it was free to do so. Whether a future benefit reduction is accomplished by moving forward the benchmark age or by changing some other element of the plan formula, it makes no substantive difference to anyone.

III. A VICTORY ON THE QUESTION ON WHICH CERTIORARI IS SOUGHT WOULD NOT INCREASE PETITIONERS' BENEFIT.

Petitioners seem to believe they can void Thiokol's 1991 plan amendment and force a temporary return to the previous plan, thus obtaining for themselves the discontinued early retirement subsidy. However, even if Petitioners somehow prevailed in this Court, under ERISA's remedial scheme they might get their attorney fees, but nothing more.

There is no support anywhere in ERISA or in the case law for the proposition that a pension plan amendment is void *ab initio* due to the sort of violation alleged by these Petitioners. Rather, the relief provided by ERISA includes *only* "those categories of relief that were *typically* available in equity. . . . " *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) (emphasis in original). Thus, at most, if Petitioners' interpretation of ERISA were correct, a court would apply the equitable remedy of reformation to make the plan comply with Petitioners' version of the law.

However, a court could not "reform" Thiokol's plan simply by rewriting it to make 65 the age from which benefits are calculated and leaving all other elements of the formula the same. That would have the effect of forcing Thiokol to pay the age 67 "bonus" at age 65. This is not "reformation," and it is beyond the court's remedial power under ERISA.

An agreement can only be "reformed" in equity to "reflect the parties' true intentions." Dan B. Dobbs, *Remedies* § 4.3 at 256 (1973). Thiokol never intended to

offer the age 67 bonus at 65, and no participant can claim he was ever promised it. These Petitioners have absolutely no equitable claim to the enhanced age 67 benefit at age 65, or to any correspondingly higher early retirement benefit calculated by assuming the age 67 bonus should apply at age 65.

Therefore, even if Petitioners were correct in asserting that ERISA prohibits calculation of benefits from any age over 65, the appropriate remedy would be to reform the plan by inserting the age 65 formula found in Appendix A, hereto. That formula would comply with Petitioners' version of the law *and* with the parties' intention. Petitioners would still receive exactly the same benefit they are now receiving.

When Thiokol pointed out in the district court that Petitioners were not entitled to any of the remedies they sought, Petitioners could respond only with, "The court can think of something." It is not that simple. Because the injury of which these Petitioners complain – lower benefits – would not be redressed with a victory on their claims here, these Petitioners lack standing even to bring the claims.

IV. THERE IS NO CONFLICT AMONG CIRCUITS.

No other circuit court has ever been asked to address the question presented by Petitioners and decided by the Tenth Circuit. Thus, no conflict exists. The cases cited by Petitioners deal with substantive statutory protections provided by ERISA, such as vesting and payment of benefits. *Johnson v. Franco*, 727 F.2d 442 (5th Cir. 1984)

(vesting); *Janowski v. Teamsters Local 710*, 673 F.2d 931 (7th Cir. 1981) (vesting and payment of benefits). Thus, it is not surprising that discussions of "normal retirement age" in these cases reflect the statutory limit for vesting and payment of benefits – age 65.

Neither *Johnson* nor *Janowski* addressed the question of whether a plan which complies with all ERISA's substantive provisions may calculate benefits from an age greater than 65. Thus, any language in those cases which seems to broaden the meaning of ERISA's statutory definition is mere dicta, and insufficient to constitute a conflict among circuits.

V. THE LEGISLATIVE HISTORY ADDS NOTHING TO PETITIONERS' ARGUMENT.

The lower courts did not simply forget to read ERISA's legislative history, as Petitioners seem to suggest. The legislative history, read in context, says nothing more than what everyone concedes: ERISA caps "normal retirement age" at 65 for its substantive requirements, such as vesting and commencement of benefit payments. Thiokol's plan indisputably conforms to each substantive requirement of ERISA.

VI. APPLICABLE REGULATIONS SUPPORT THE LOWER COURTS' DECISIONS.

Petitioners cite regulations which are ambiguous and which simply restate ERISA's definition of "normal retirement age," and which, like ERISA's definition, expressly limit their application to the "part" or "chapter" in which

they are found. (Petrs. App. 23a-26a.) Significantly, Petitioners have cited *no* regulations governing the benchmark age from which benefits must be calculated, because none exist.

By contrast, I.R.S. regulations expressly *permit* a participant's accrued benefit at age 65 to be expressed as the actuarial equivalent of a retirement benefit calculated from some other age. The I.R.S. regulation defining "accrued benefit," 26 C.F.R. § 1.411(a)-7(a), states in pertinent part:

> **(a) Accrued benefit.** For purposes of section 411 and the regulations thereunder, the term "accrued benefit" means –
>
> (1) *Defined benefit plan.* In the case of a defined benefit plan –
>
> (i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or
>
> (ii) If the plan does not provide an accrued benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age **which is the actuarial equivalent . . . of the accrued benefit determined under the plan**. (Emphasis added.)

This regulation expressly refutes Petitioners' argument that ERISA requires the benefit payable at age 65 to be the so-called "full" benefit – meaning a benefit calculated from age 65. This regulation specifically permits "actuarial adjustment" – which can mean an actuarial reduction or an actuarial enhancement – of a hypothetical benefit calculated at some other age. No matter the formula by which it is expressed, the benefit which was

promised is still being paid. As the Tenth Circuit recognized, "Regardless that the 65-year-old retiree's benefit [under Thiokol's plan] is 86.7% of some other quantity, the 65-year-old's entitlement to that plan-defined retirement benefit is afforded the full protection required by ERISA." (Petrs. App. 4a.)

Furthermore, 26 C.F.R. § 1.411(a)-7(b)(2), Example (2), describes a plan which calculates benefit from age 70, actuarially reducing for retirement before that age, and states only that "[f]or purposes of section 411 and the vesting regulations," normal retirement age can be no later than 65. (Petrs. App. 28a.)

Thus, ERISA's regulations provide both express and implied support for the lower courts' decisions.

CONCLUSION

The Petition in this case misleads by misstating facts and law. Petitioners' benefits have **not**, as Petitioners assert, been "reduced" in any real way merely because they are now calculated from age 67. Petitioners' benefits have **not**, as Petitioners imply, been "reduced" from the amount they have earned. Neither these Petitioners nor anyone else would be entitled to higher benefits if the benchmark age were capped at 65, as Petitioners imply.

There is no conflict among circuits, because this question has never before been addressed. The Tenth Circuit's decision did not work any change in the law, and did not "create[] confusion where before there was none," as Petitioners allege. (Pet. at 7.) There never was a cap on

the age from which benefits are calculated, because it makes no substantive difference. The Tenth Circuit and the Utah District Court simply saw past the cynical confusion which these Petitioners – not the Tenth Circuit – have created.

Thiokol respectfully requests that certiorari be denied.

DATED: August 15, 1997.

Respectfully submitted,

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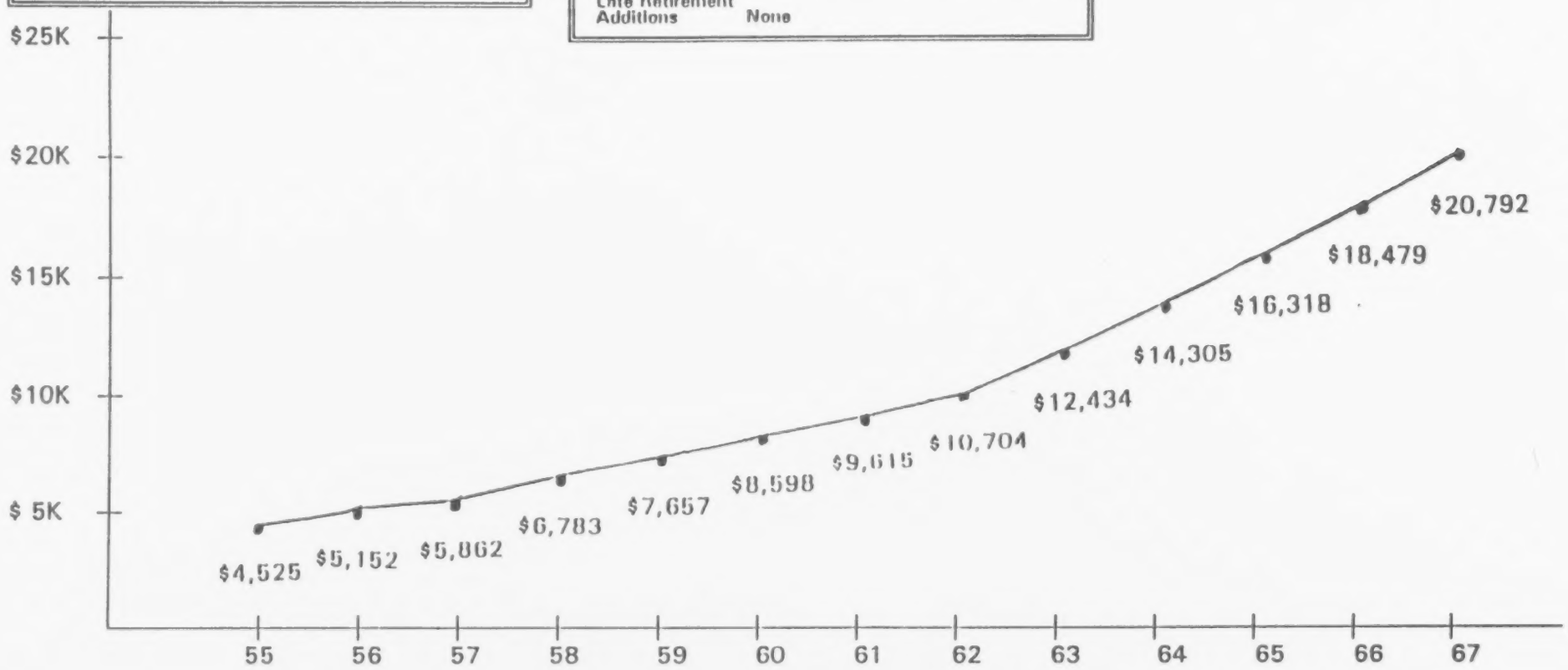
APPENDICES

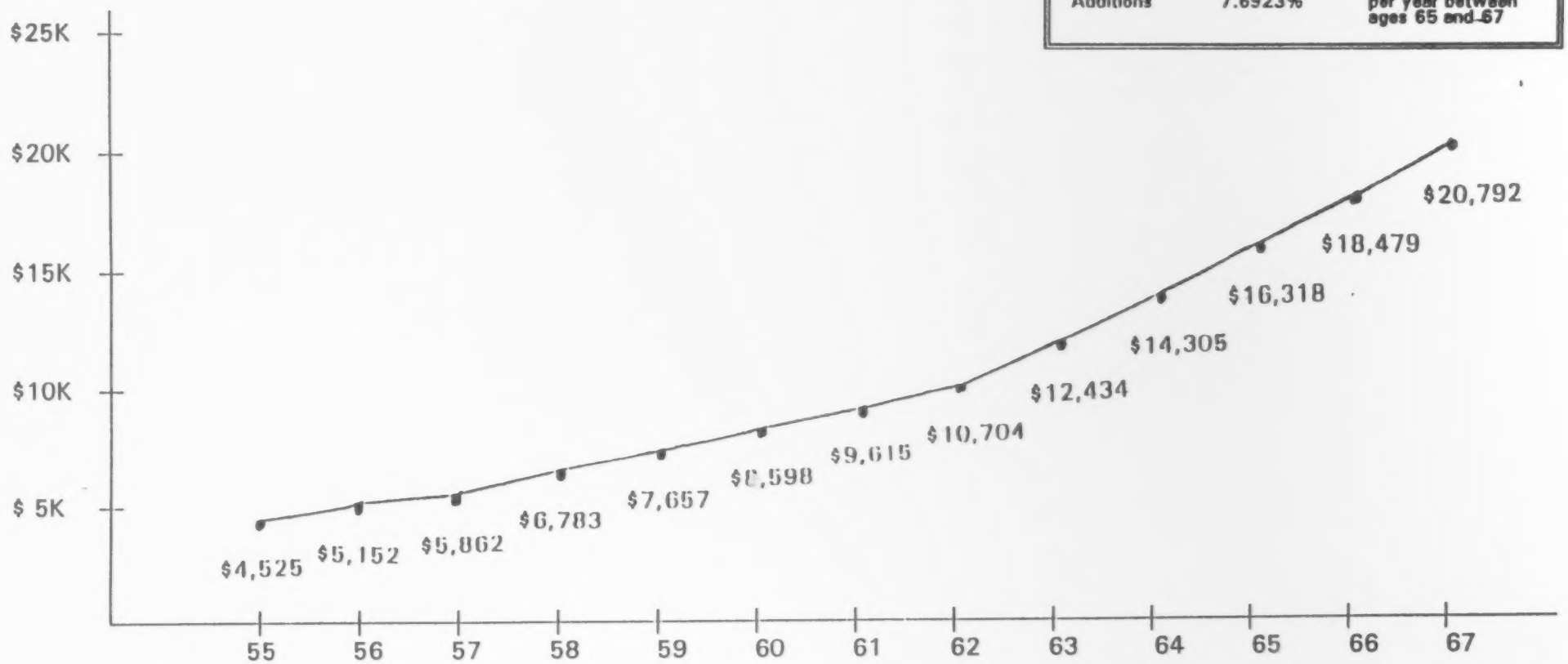
APPENDIX A BENEFIT FORMULA

SAMPLE EMPLOYEE (RETIRING IN 1995)	
FINAL AVERAGE PAY:	$40,000
SERVICE AT AGE 55:	20
SERVICE PRIOR TO 1/1/84:	9

NORMAL RETIREMENT AGE = 67		
Formula	1.48% FAP x pre-1/84 service	
	+ 1.23% FAP x post-1/84 service	
	+ .75% FAP in excess of covered compensation x service up to 35 years	
Early Retirement Reductions	6-23%	per year between ages 62 and 67
	3-1/3%	per year between ages 57 and 62
	4.13%	from age 57 to age 56
	3.73%	from age 56 to age 55
Late Retirement Additions	None	



NORMAL RETIREMENT AGE = 65		
Formula	1.282667% FAP x pre-1/84 service	
	+ 1.066% FAP x post-1/84 service	
	+ .65% FAP in excess of covered compensation x service up to 35 years	
Early Retirement Reductions	7.6923%	per year between ages 62 and 67
	3.8462%	per year between ages 57 and 62
	4.7688%	from age 57 to 56
	4.3073%	from age 56 to 55
Late Retirement Additions	7.6923%	per year between ages 65 and 67



APPENDIX B

26 C.F.R. § 1.411(a)-7

§ 1.411(a)-7 Definitions and special rules.

(a) Accrued benefit. For purposes of section 411 and the regulations thereunder, the term "accrued benefit" means –

(1) Defined benefit plan. In the case of a defined benefit plan –

(i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or

(ii) If the plan does not provide an accrued benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and § 1.411(c)-5 of the accrued benefit determined under the plan. In general, the term "accrued benefits" refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h). For purposes of this paragraph a subsidized early retirement benefit which is provided by a plan is not

taken into account, except to the extent of determining the normal retirement benefit under the plan (see section 411(a)(9) and paragraph (c) of this section). The accrued benefit includes any optional settlement at normal retirement age under actuarial assumptions no less favorable than those which would be applied if the employee were terminating his employment at normal retirement age. The accrued benefit does not include any subsidized value in a joint and survivor annuity to the extent that the annual benefit of the joint and survivor annuity does not exceed the annual benefit of a single life annuity.